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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN M. PURDY, JR.,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is it a criminal violation of the Federal Anti-Kickback Act where a kickback is paid to obtain what is thought to be a purely private commercial contract and where there is no knowledge that the contract involved is federal nor any purpose or intent to obtain a federal contract?

2. Where the Sentencing Guidelines specifically provide for an upward adjustment to the base level offense for a kickback based upon the higher of either the amount of the kickback paid or the profit realized on the contract involved, can the sentencing court use another method for arriving at a much higher enhancement where the bribe amount is easily determined but profit cannot be determined?

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The decision of the Court of Appeals for the Second Circuit is reported at 144 F.3d 241 (2d Cir. 1998), and is reproduced in the Appendix at App. 1.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals was filed on June 10, 1998. A timely petition for rehearing with suggestion for rehearing en banc was filed; it was denied by order dated August 12, 1998. (App. 22) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES AND SENTENCING GUIDELINES INVOLVED

Pursuant to Rule 14(1)(f) of the Supreme Court Rules, and because they are lengthy, the statutes and sentencing guidelines at issue are set forth verbatim in the Appendix, at pages App. 24 to App. 31.

This petition challenges the Second Circuit's definition of the mental element of a criminal violation of the Anti-Kickback Act, 41 U.S.C. §§ 51 et seq. The statutes involved are 41 U.S.C. §§ 52, 53, and 54.

This petition also challenges the lawfulness of the sentence imposed in this case. The relevant Guidelines, U.S.S.G. § 2B4.1 and § 2C1.1, are set forth in the Appendix, together with pertinent Guidelines Commentary.

STATEMENT OF THE CASE

Petitioner John M. Purdy, Jr. was convicted of one count of conspiracy to violate the Anti-Kickback Act, 41 U.S.C. §§ 51

et seq., in violation of 18 U.S.C. § 371. He was sentenced to serve 37 months based upon a base offense level of 8 (admittedly the correct base level) which was then adjusted upward by 11 levels based upon what Petitioner contends to have been an improper calculation of "benefit conferred," rather than the kickback amount which the Guidelines mandate.

Background

The Purdy Corporation (of which Petitioner Purdy was president) produced machined parts and assemblies for the aircraft industry. Among its customers was Sikorsky Aircraft, which purchased parts from Petitioner's company and then used those parts to manufacture new helicopters and to refurbish used helicopters. Sikorsky in turn sold its finished helicopters to either (1) commercial customers; (2) foreign governments and their military branches; or (3) the United States government and its military. The parties and the courts below agree that the Anti-Kickback Act applies only to contracts between Purdy Corporation and Sikorsky for supply of machined parts and assemblies relating to contracts which Sikorsky had for sale of helicopters to the United States government and its military (Sikorsky's prime contracts).

The Trial

Taking the evidence in the light most favorable to the government, the evidence at trial showed that purchasing agents from Sikorsky demanded money from Purdy Corporation in exchange for the awarding of contracts to the Purdy Corporation, and that approximately $20,000 to $60,000 in cash payments were made (or caused to be made) by Petitioner to the Sikorsky purchasing agents who had demanded them. The critical issue at trial was not whether Petitioner had conspired to commit commercial bribery, but rather whether he had (and

whether the government could prove that he had) the requisite criminal intent to be guilty under the federal Anti-Kickback Act.

Specifically, the defense at trial was that Petitioner did not knowingly and wilfully (41 U.S.C. § 54) make the payments to Sikorsky "for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract." 41 U.S.C. § 52(2) (emphasis added). Since "prime contract" and "subcontract" are defined as being federal contracts (41 U.S.C. § 52 (5) and (8)), Petitioner's defense was that there was neither knowledge that federal contracts were involved, nor any purpose or intent to gain favorable treatment in connection with federal contracts.

Petitioner contended that the wording of the Act, quoted above, required the government to prove that he (1) knew that a federal contract was involved and (2) had the purpose or intent to secure favorable treatment in relation to such a contract. The trial court interpreted the Act in the very same way, first settling an instruction early in the trial and then later actually instructing the jury that, to convict Petitioner, the jury must find:

> that there existed a conspiracy between Mr. Purdy and at least one other person . . . to knowingly and willfully provide the payments specified in the indictment for the purpose of improperly obtaining favorable treatment in connection with prime contracts between the government and Sikorsky . . .

(Tr. 2045)

With the above-described state of mind being the battleground at trial, however, the trial court made three rulings adverse to Petitioner which all related to his state-of mind

defense, i.e., whether Petitioner knew that federal contracts were involved and whether he paid money for the purpose of securing advantage on any such contracts. First, the district judge refused to allow a government employee to testify for Petitioner to the effect that even the government had a difficult time discerning whether the particular purchase orders involved in the case related to a government contract or to a non-governmental contract. (Tr. 1533) This testimony was offered to show that it was impossible for Petitioner to know whether a contract covered by the Act (i.e., a government contract) was involved. Second, she refused to grant a Rule 29 motion to dismiss, made upon the ground that there was insufficient evidence that the Petitioner had acted knowingly, for the purpose of influencing the award of any government contract.[1] (Ruling dated 12/3/96) Third, she refused to give a theory of the defense jury instruction which would have highlighted the above-quoted state-of-mind defense. (See Defendant's Requested Jury Instruction No. 24, Substitute) The jury returned a guilty verdict.

The Sentencing

At sentencing, the district judge found that Petitioner's offense level was 19, and she sentenced Petitioner to a term of imprisonment of 37 months. The court incorrectly arrived at this high offense level by starting with the (admittedly correct) base offense level of eight (U.S.S.G. § 2B4.1(a)), and then incorrectly making an 11 point upward adjustment by determining that the

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[1] There was little or no evidence from which the jury could have concluded that Petitioner even knew that government contracts were involved, much less that he purposely acted to obtain them. Of the 140 purchase orders involved, only 22 were put in evidence, and, of them, only seven involved government contracts. No witness testified that Petitioner aimed at government contracts or knew they were involved.

"benefit conferred" by the bribes was the very large sum of $1,176,155.[2]

Petitioner contended that his offense level should be adjusted based on the much lower amount of the bribes made to the purchasing agents ($20,000 according to Petitioner and $60,000 according to the pre-sentence report) since the alternative measure permitted by the Guidelines --"benefit conferred," which is defined as "profit" (See 2B4.1(b)(1)) -- could not be determined. (See Sealed Sentencing Appendix at 72-74, 48)

The Appeal

On appeal to the Second Circuit, Petitioner urged reversal on the three state-of-mind related points stated above, namely, that the evidence was insufficient to show that his purpose was to obtain government contracts; that the trial judge should have given the theory of defense instruction relating to his purpose; and that the trial court should have permitted the defense to show, through a government employee, that it was extremely difficult to determine that the purchase orders involved were related to government contracts.

The Court of Appeals did not address any of these three arguments.

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[2] If, as in this case, the amount of the bribe is greater than $2,000, the Guidelines require an upward adjustment for either the amount of the bribe, or the benefit conferred as a result of the bribes, whichever is greater. (U.S.S.G. § 2B4.1(b)(1)) Using the table designated in U.S.S.G. § 2F1.1, a benefit conferred in the amount of $1,176,155 yields an offense level increase of 11 points.

"Disagree[ing] with the initial premise" on which the case had been tried and the appeal prosecuted, the court ruled that the district court's instruction to the jury to the contrary notwithstanding, a criminal conviction under the Anti-Kickback Act did not, after all, require the government to prove any purpose or intent to obtain advantage on a government-related contract. (App. 5) It ruled that payments made "at any point in the government procurement process for the purpose of improperly obtaining favorable treatment are prohibited by the [Anti-Kickback] Act, regardless of whether or not the offender knew of the government involvement," (App. 9), and that one who makes such a payment "assumed the risk" that his conduct "might result in federal prosecution." (App. 6) The Court proclaimed it "so much the better" (App. 6) if a demand for a kickback ensnares someone who pays a bribe demand with absolutely no knowledge that government work was involved and with absolutely no purpose to secure favorable treatment in connection with government work. Such broad application was extolled as in furtherance of Congressional policy to rid federal procurement of bribery or corruption. (App. 6-9)

Having removed the state-of-mind requirement from the Anti-Kickback Act, the Second Circuit concluded that the defense theory relating to Petitioner's state-of-mind "was not a lawful defense," (App. 10) and thus there was no need to consider Petitioner's appellate claims regarding the sufficiency of the evidence, the jury charge requested by the defense, or the exclusion of the testimony the defense wished to present. Since there was no state of mind requirement, these matters were "irrelevant," "entirely irrelevant," and "moot." (App. 10, 12) In one fell swoop, and to the Petitioner's unmitigated detriment, the appeals court changed the ground rules after the trial had ended, rejecting the premise which had been validated by the trial court, and which was the foundation of the trial, the defense, and the appeal. This itself was fundamentally unfair.

On the sentencing issue relating to the 11 point upward adjustment for "benefit conferred," the Second Circuit stated that Commentary to the Guidelines "suggests" that "benefit conferred" is "normally" profit in bribe-for-contract cases (App. 19), but that the district court acted within its discretion in calculating benefit conferred using a measure other than profit where profit could not be computed, even though the Guidelines expressly provide that, if "benefit conferred" cannot be computed, the amount of the bribes is to be used.

In a timely petition for rehearing and rehearing in banc, Petitioner pursued his sentencing claim and urged that the panel's construction of the statute rewrote the Anti-Kickback Act in a way its language did not permit, Congress did not intend, and this Court had forbidden. He urged also that, even if the panel's construction of the statute were correct, he was nevertheless entitled to a new trial because the entire trial and appeal had, under the panel's own decision, proceeded on a false premise. (App. 5) Rehearing and rehearing en banc were denied by order dated August 12, 1998. (App. 22)

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO DETERMINE THE MENTAL STATE REQUIRED FOR CONVICTION UNDER THE ANTI-KICKBACK LAW

A. The Importance Of The Act

Federal procurement is everywhere. So is its regulation. All Circuits abound with federal contracting and thus presumably with vigorous enforcement of the federal Anti-Kickback Act. The Act affects thousands of individuals and

entities in all parts of the country doing business with the government, either directly, as prime contractors, or as subcontractors (suppliers of goods and services to prime contractors) when they provide goods or services to those that do business with the government under prime contracts. See United States v. Perry, 431 F.2d 1020, 1023 (9th Cir. 1970). A nationwide definition of what constitutes a crime under the Act is clearly needed.

B. The Disruptive Effect Of The Second Circuit's Holding

Without the mens rea requirement, which the Second Circuit dispatched from the Act, the Act assumes a disturbing breadth and will have disruptive effects on the way business is done in this nation. The term "kickback" means not only cash, but also any "gift, gratuity [or] thing of value." 41 U.S.C. § 52(2). It therefore includes all manner of payments for entertainment, meals, holiday gifts (such as turkeys and hams), complimentary sports, theater and opera tickets, and use of company-owned ski lodges, boats and the like.[3] These very same expenditures are legally recognized by the Internal Revenue Code as "ordinary and necessary" expenses when incurred in connection with attempting to gain favorable treatment from a potential customer on a purely non-government contract. See 26 U.S.C. §§ 162, 274.

Such traditional business promotion and entertainment simply has not been condemned by the Anti-Kickback Act, even if one businessperson entertains another to secure business which happens to involve a federal contract. The Act -- at least

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[3] Indeed, a jury instruction was given in Petitioner's case which made it clear that kickbacks included the items and gifts indicated above. (Tr. 2041) They were part of the proof in the case. (Tr. 436-41, 750-51, 1057-61)

before the Second Circuit held otherwise -- made such conduct criminal only if, beyond reasonable doubt, it was undertaken "for the purpose" of gaining advantage in relation to a federal contract. The Second Circuit's ruling would criminalize any gratuity given to anyone regardless of what the gift-giver knew or intended. According to that court:

> If in the process, deterrence was extended not only to those who specifically contemplated the government relationship but also to other commercial bribers who thereby assumed the risk that there wrongful deeds might result in federal prosecution, so much the better.

(App. 6) (emphasis added).

Felony sanctions have never been triggered by such happenstance. Dispensing with the mens rea provisions in the Anti-Kickback Act is not only contrary the manner in which criminal statutes have been interpreted by this Court, it would promote nothing but uncertainty in relation to all manner of traditionally accepted business interaction. The opinion below would place in the criminal dock thousands of unwary but innocent business persons who, while thinking they were engaged in business entertainment so ordinary that it is blessed by the Internal Revenue Code, would actually be felons. Such a construction of the Act is not "so much the better." (App. 6) It is at odds with one of the foundations of our criminal justice system which insists that "before one can be punished, it must be shown that his case is plainly within the statute. McNally v. United States, 483 U.S. 350, 360 (1987), quoting Fasulo v. United States, 272 U.S. 620, 629 (1926).

C. The Need For Clarification By This Court

"Few areas of criminal law pose more difficulty than the proper definition of the mens rea required for any particular crime." United States v. Bailey, 444 U.S. 394, 403 (1980). This is true where the statute specifies no mens rea element expressly. See, e.g., United States v. Feola, 420 U.S. 671 (1975) (assault upon a federal officer while engaged in performance of his official duties). It is even more forcefully true when, as the case with the growing number of federal regulatory statutes having criminal provisions, the statute in question, defines a crime in numerous, separately stated subsections which are linguistically complex and which include, in their separate subsections, the terms "knowingly and willfully" and "for the purpose of," as the Anti-Kickback Act does.

In order to avoid the type of judicial inconsistency which led the District Court and the Second Circuit in this case to view the mens rea requirements so very differently the proper and definitive definition of these statutes rests with this Court. See Bryan v. United States, 118 S.Ct. 1939 (1998) (mens rea required for dealing in federal firearms without a license); Ratzlaf v. United States, 510 U.S. 135 (1994) (mens rea required for violating anti-structuring provisions).

The little existing decisional law interpreting the Act shows a conflict which needs resolution by this Court. In Petitioner's case, the Court of Appeals relied on an Eighth Circuit decision, United States v. Hanis, 246 F.2d 781, 784-86 (8th Cir. 1957), for the proposition that, under the predecessor statute, a defendant could be found guilty even if he did not know that there existed a federal contract that brought his conduct within the purview of the Act.

The First Circuit has more recently held otherwise, indicating that, while the Act does not require a showing of a

specific intent to influence the award of "particular subcontracts," it does require that the government prove beyond a reasonable doubt that the defendant knew the payments were made as an inducement for the award of some subcontract or orders under a prime contract. Howard v. United States, 345 F.2d 126, 128 (1st Cir.), cert. denied, 382 U.S. 838 (1965). Since a prime contract is specifically defined as a contract "entered into by the United States" 41 U.S.C. § 52(4), the purpose proscribed by the statute must be to obtain favorable treatment in relation to a United States contract.

Under the Second Circuit's ruling in this case, and in direct conflict with the ruling in Howard, the existence of a prime contract is a jurisdictional requirement only, an element as to which no mens rea need be shown. The Second Circuit, unlike the First Circuit in Howard, does not link the mental state to the type of contract. The two are completely untethered.

D. The Second Circuit's Construction Is Wrong

Statutory construction must always "begin with the statute's language," Muscarello v. United States, 118 S.Ct. 1911, 1914 (1998); see also Bailey v. United States, 516 U.S. 137 (1995). All of the relevant language must be considered and analysis must be made of how the various words in the statute relate to one another. However worthy a purpose a Circuit Court divines from the existence of a statute or from its history, courts must stick to the statutory language. However troublesome certain statutory terms may be to the interpretation of a statute desired by a court, such troublesome terms are not "words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistence should be heightened when the words describe an element of a criminal offense." Ratzlaf, supra, 510 U.S. at 142.

The language of the Anti-Kickback Act really answers the mens rea question and ends the inquiry, when it is read as Ratzlaf commands. The Act plainly criminalizes only such payments as are made for the purpose of obtaining favorable treatment in relation to government contracts. That is what the language says unless, contrary to Ratlaf's mandate, some of that language is treated as "words of no consequence."

Under the Act, there is no offense unless there is a kickback, a payment made knowingly, and willfully, and for a proscribed purpose, "the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract ... or a subcontract relating to a prime contract." 41 U.S.C. § 52(2). The Court of Appeals read the proscribed purpose as limited to the following: "to obtain or reward favorable treatment." Yet that is a strained and unnatural reading of § 52(2)'s words and is at odds with the sentence's structure and its punctuation. Basic rules of English syntax require reading the prepositional clause "in connection with a prime contract ... or subcontract" to modify the words "favorable treatment" which immediately precede it, just as one must read the prepositional clause "of improperly obtaining or rewarding favorable treatment" to modify the work "purpose" which immediately precedes it. The absence of a comma between the first prepositional clause and the second further supports that natural and commonsensical reading of these parallel (and clearly related) clauses.

Apart from the unarguable grammar, the prepositional clause "in connection with a prime contract ... or subcontract" can not, under Ratzlaf, be treated "essentially as surplusage - as words of no consequence." 510 U.S. at 142. These words "mean something." Id. See also Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment.")

When all of the phrases of the Act are read together, and none ignored, an offense under § 53 which is punishable criminally under § 54, requires a showing that the accused made a payment knowingly and willfully and with the purpose of obtaining favorable treatment on one or more government-related contracts. The Second Circuit's contrary reading unnaturally bisects the critical clause, divorcing its ending from its beginning, and declaring, in essence, that its ending is jurisdictional only.

The Court of Appeals impermissibly based its tortured construction on what it perceived to be the broad legislative purpose underlying the Anti-Kickback Act, a broad purpose to protect the federal procurement system. It then determined that federal procurement would best be protected if the statute covered "any commercial bribery occurring anywhere within the ... system," declaring it "so much the better" if the law were to reach "other commercial bribers who ... assumed the risk that their wrongful deeds might result in federal prosecution." (App. 6)

This Court, however, has held it "impermissibl[e]" for the federal courts to rely on their understanding of the broad purposes of legislation to establish its reach or meaning. After all:

> no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 526-27 (1987) (per curiam). However laudable the goal, "If Congress desires to go further, it must speak more clearly than it has." McNally v. United States, 483 U.S. at 360 (declaring that mail fraud statute as then written did not cover frauds aimed at intangible rights since such rights were not unambiguously covered by statute's wording).

Besides, proper consideration of the legislative history compels the conclusion that Congress did not intend the criminal provisions of the Act to have a broad sweep, or to reach any persons other than those with a high degree of mental culpability. While the Second Circuit correctly noted that 1986 amendments "sought to broaden" (App. at 6) the coverage of the Act (to various transactions theretofore not covered), and also raised the criminal penalties, the very legislative history relied upon by the Court for noting this new breadth (App. 7) explained why, at the same time, Congress explicitly "tightened" criminal liability under the statute:

> The existing [pre-1986] Act's criminal penalties apply to anyone who knowingly makes or receives a prohibited payment. Thus H.R. 4783 both broadens and tightens the application of the criminal provision by applying them to persons who include kickback costs in the price of a contract, as well as those who pay (or solicit) or offer (or receive) a kickback. In light of the bill's stiff criminal penalties and broad scope, the Committee believes the high standard of conscious culpability - willfulness - must be shown.

H. Rep. No. 99-964 at 14, reprinted in 1986 U.S.C.C.A.N. at 5971 (emphasis added).

Because the Second Circuit's decision tortures the statutory language, lowers the level of conscious culpability required for conviction, extends the reach of this important federal law, conflicts with a decision of another Court of Appeals, and ignores the canons of construction recognized by this Court for construing federal statutes, especially those defining federal crimes, certiorari should be granted.

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS, WHICH WROTE A NON-EXISTENT EXCEPTION INTO THE SENTENCING GUIDELINES, UNDERMINES THE ENTIRE GUIDELINES SCHEME

In determining the offense level for sentencing purposes, the district court judge failed to do what the Guidelines and the Guidelines Commentary instructed her to do. The Court of Appeals affirmed the sentence, justifying that outcome by adding the word "normally" to a mandatory guidelines provision which, by its terms, recognized no exceptions. By adding the word "normally," the Court of Appeals, in essence, held that a sentencing judge does not always have to do what the Guidelines direct. In so doing, the Second Circuit undermined everything the Guidelines are supposed to accomplish.

The Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 et seq., 28 U.S.C. §§ 991-98, made far-reaching changes in federal sentencing. In response to perceptions that "federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances," Koon v. United States, 116 S.Ct. 2035, 2043-44 (1996), quoting, S. Rep. No. 98-225, at 38 (1983), Congress created the United States Sentencing

Commission and charged it with developing a comprehensive set of sentencing guidelines. The Commission promulgated the United States Sentencing Guidelines, which specify an appropriate sentencing range for each class of convicted persons based on various factors related to the offense and the offender. A district judge now must impose a sentence within the range of the applicable Guideline, if the case is an ordinary one. It may go outside the guideline range -- "depart" -- only in extraordinary cases. 18 U.S.C. § 3553(b). See generally Koon at 2043-44.

Whether the Guidelines achieve their goals depends largely on whether the offense level is properly computed. If it is not, the guideline range will be incorrect. If the offense level miscalculation is a serious one, a sentence outside the appropriate guideline range will be imposed. Not surprisingly, the Guidelines deal at length with computation of the offense level for particular crimes.

Section 2B4.1(a) of the Sentencing Guidelines sets a base offense level of eight for kickbacks and commercial bribery. The offense level is to be adjusted upward (using the table in U.S.S.G. § 2F1.1) if the greater of the "the value of the bribe or the improper benefit to be conferred" exceeded $2,000. U.S.S.G. § 2B4.1(b)(1). Commentary to § 2B4.1 explains "value of the improper benefit to be conferred" and cross-references to the Commentary to U.S.S.G. § 2C1.1.

That Commentary includes an example which is precisely on point, stating that, where a contract is made in return for a bribe, the benefit is the profit (or intended profit) on the contract. U.S.S.G. § 2C1.1, comment. n.2. Other Commentary directs that, where the value of the benefit "cannot be determined," the value of the bribe must be used. U.S.S.G. § 2C1.1. (back'g note)

Petitioner's position at sentencing was that the benefit conferred -- which in this case had to mean profit, given the Commentary's example -- could not be determined and that the value of the bribes ($60,000 according to the PSR, less than $20,000 according to the defense) had to be used to adjust the base offense level. The government agreed that profit could not be determined but insisted that the benefit conferred was $1,176,155. That figure was the difference between the negotiated purchase order prices and the prices Sikorsky would have paid had it entered into contracts that tracked initial costings that had been prepared by the Purdy Corporation.[4] The defendant insisted that the government's calculus had nothing to do with benefit conferred, no matter how that term might be construed, but that, in any event, the Guidelines directed that benefit conferred meant "profit" in this case. The government conceded that its figure did not measure profit.

On appeal, the defendant re-asserted the arguments he had advanced at sentencing. The Second Circuit rejected his claim. It wrote that Commentary to the Guidelines "suggests" that "benefit to be conferred" is "normally calculated in such situations on the basis of ... profits." (App. 19) It stated further that the district court "lack[ed] appropriate data to make that calculation and instead calculated the "benefit conferred" in a different way. (App. 19) The Court concluded by stating that "the approach taken by the district court was fully supported by evidence introduced at trial and well within the court's discretion." (App. 20) With all due respect, what the Court of

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[4] These costings had never been used or adopted by the corporation for pricing purposes, and the evidence was undisputed that they were based on outdated labor, overhead and administration rates, and would have yielded losses, not profits, if Petitioner's company had entered into contracts with Sikorsky based upon them. (Sealed Sentencing Appendix 62-64; Tr. 1366-67, 1373)

Appeals did was permit the district court to ignore the direction of the Sentencing Guidelines.

This Court has made clear that Commentary to the Sentencing Guidelines that interprets or explains a Guideline is not a "suggest[ion]." It is "authoritative" unless it violates the Constitution or a federal statute or is inconsistent with or a plainly erroneous reading of the Guidelines. Stinson v. United States, 508 U.S. 36 (1993). The equation of benefit conferred with profit in the bribe-for-contract context surely does not violate the Constitution or any federal law, nor is it inconsistent with, or a plainly erroneous reading of, the Guidelines. Given its authoritative nature, the Commentary, including the examples contained therein, could not be ignored. See United States v. Hogan, 116 F.3d 442 (10th Cir. 1997) (citing Stinson, and finding defendant's conduct "practically indistinguishable from the commentary example"); United States v. Yusufu, 63 F.3d 505 (7th Cir.), cert. denied, 516 U.S. 1015 (1995) (citing Stinson, and applying Application Note where conduct is "similar to the Guidelines example"); United States v. Luna, 21 F.3d 874 (9th Cir. 1994) (citing Stinson, and finding that the case "fits the [example in the] Application Note precisely, and we are bound to follow that Note").

The Commentary and its example should not have been nullified by adding a "normally" that nowhere appears in the text. The Sentencing Commission well knows how to use the word "normally" if it believes that there may be exceptions to a general rule. See, e.g., U.S.S.G. § 2X3.1, comment. (n.2), and 2X4.1, comment. (n.2) ("the adjustment [for mitigating role] normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level"); U.S.S.G. § 5K2.3, p.s. ("Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only where [certain factors exist]"). In this case, the Court of Appeals did not even offer a reason why the "normal" provision should

not apply. Certainly, its recognition that "profit" could not be computed on the record that existed provided no grounds not to apply the Guidelines as drafted: The Sentencing Commission anticipated situations where profit could not be determined and directed that, in such cases, the amount of the bribe should be used.

Many are dissatisfied with the Guidelines as a whole and with their application in particular cases. Some believe that they have not brought us significantly closer to the goal of lessening sentencing disparities. Some believe that, to the extent they have brought some rationality to sentencing, they have sacrificed other, more important, goals. Certainly, there are problems with the Guidelines. But nothing useful will be achieved by tolerating the kind of covert, but truly subversive, attack on the Guidelines that the Court of Appeals' decision in this case represents.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
For the Second Circuit

August Term 1997

(Argued: January 8, 1998

Decided: June 10, 1998

Docket No. 96-1817

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. PURDY, JR.,

Defendant-Appellant.

Before: VAN GRAAFEILAND, WALKER, Circuit Judges, and RAKOFF, District Judge.*

Appeal from conviction and sentence in the United States District Court for the District of Connecticut, Janet Bond Arterton, Judge, for conspiracy to violate the Anti-Kickback Act.

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* Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Affirmed.

ALAN M. DERSHOWITZ, Cambridge, MA (Victoria B. Eiger, Dershowitz & Eiger, P.C., New York, NY, Jacob D. Zeldes and Brian E. Spears, Zeldes, Needle & Cooper, P.C., Bridgeport, CT, of counsel), for Defendant-Appellant.

MARK G. CALIFANO, Assistant United States Attorney (Christopher F. Droney, United States Attorney for the District of Connecticut, of counsel), New Haven, CT, for Appellee.

RAKOFF, District Judge:

In the idiom of economic crime, a "kickback" is a kind of commercial bribe. "Typically, they are payments made by one business to employees of another in order to induce favorable commercial treatment from [the employees'] company." H.R. Rep. No. 99-964, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 5960, 5962. In 1946, Congress -- concerned that employees of prime contractors on certain government procurement contracts were being bribed to enter into inflated subcontracts for which the government ultimately paid -- passed the Anti-Kickback Act, 41 U.S.C. §§ 51-58, to bring such conduct within the purview of federal prosecution. See H.R. Rep. No. 79-212 (1945), reprinted in 1946 U.S.C.C.S. 1081. In 1960, Congress amended the Act so as to apply to all

negotiated federal contracts, and in 1986, amended it again so as to apply generally to "all Federal contracts" and thus "to enhance the government's ability to prevent and prosecute kickback practices" that in any way touched the federal procurement process. H.R. Rep. No. 99-964, at 4.

Appellant John M. Purdy, Jr. would now have this Court read the amended statute, contrary to its language, history, and purpose, to preclude prosecution of any kickback-paying subcontractor who did not consciously intend to defraud the government itself. We decline the invitation and affirm appellant's conviction and sentence.

Purdy was President and Chief Executive Officer of The Purdy Corporation ("Purdy Co."), which regularly supplied helicopter parts to the Sikorsky Aircraft Division of United Technologies Corporation ("Sikorsky"). Sikorsky in turn sold the assembled helicopters to a variety of customers, including the United States government. Between May 1989 and August 1990, Purdy paid tens of thousands of dollars in bribes to two Sikorsky purchasing agents, Alexander Bevvino and Bruce Cafasso, in order to obtain increased Sikorsky business for Purdy Co. Of the twenty-two or more purchase orders obtained thereby, at least seven related to government contracts on which Sikorsky

was the prime contractor. The bribes only ceased after Purdy learned that Sikorsky employees were being investigated for receiving kickbacks.

Purdy and a confederate, Martin Ferris, were indicted thereafter, pursuant to 18 U.S.C. § 371,[1] for conspiring with the Sikorsky purchasing agents to violate the Anti-Kickback Act. After a ten-day trial before the Hon. Janet Bond Arterton, United States District Judge, and a jury, Ferris was acquitted and Purdy was convicted. On December 11, 1996, Judge Arterton sentenced Purdy to thirty-seven months in prison, three years of supervised release, a period of community service, and a $250,000 fine.

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[1] 18 U.S.C. § 371 reads, in pertinent part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both." Purdy and Ferris were indicted (under the first clause) for conspiring to commit a federal offense, to wit, violation of the Anti-Kickback Act, rather than (under the second clause) for conspiring to defraud the United States.

As his primary point on appeal, Purdy contends that conviction of conspiracy to violate the Anti-Kickback Act requires proof that the defendant specifically intended to obtain favorable treatment on government-related contracts, whereas the proof at trial showed only that Purdy intended to obtain Sikorsky business in general and was insufficient to show a specific intent to obtain government-related business. Because we disagree with the initial premise, we do not reach the issue of the sufficiency of the evidence.

The gravamen of the instant offense is not a conspiracy to defraud the government, which Congress outlawed decades before the Anti-Kickback Act.[2] Rather, from the outset, the purpose of the Anti-Kickback Act was to reach beyond intentional frauds perpetrated directly on the government and to secure the subcontracting of government-related contracts from commercial bribery. See generally H.R. Rep. No. 79-212 (1945).

As the Congress that enacted the 1946 Act recognized, the government, though not

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[2] See the second clause of 18 U.S.C. § 371 (not here utilized), supra n.1, criminalizing any conspiracy "to defraud the United States." See generally Abraham Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405 (1959).

directly defrauded, ultimately pays for such commercial bribery as occurs at the subcontracting level. Since many "prime contractors are reimbursed by the United States for the cost of all subcontracts and purchase orders performed thereunder, the Government undoubtedly bears the ultimate costs of such fees, commissions, and gratuities without receiving any benefit therefrom." Id. Congress therefore sought to punish all those whose commercial bribery had an adverse impact on the federal treasury, regardless of whether their intent was only to defraud their immediate customer. If, in the process, deterrence was extended not only to those who specifically contemplated the government relationship in their fraud but also to other commercial bribers who thereby assumed the risk that their wrongful deeds might result in federal prosecution, so much the better.

The 1960 and 1986 amendments of the Anti-Kickback Act sought to broaden its coverage even to instances of bribery not directly impacting the federal treasury. As the House Committee that authored the 1986 amendment stated: "Whatever form they take, all kickbacks serve to undermine Federal procurement. . . . Furthermore, inflated contract pricing is not their only effect. Kickback activity corrupts the Federal procurement system. It drives out honest competitors and destroys the markets in which the

government must bargain." H.R. Rep. No 99-964, at 5 (1986). Accordingly, Congress substantially rewrote the statute in 1986 with the express purpose of extending the scope of the statute to any commercial bribery occurring anywhere within the federal procurement system. See id. at 10.

The language of the amended statute lays bare this purpose. The section defining "Prohibited conduct" makes it unlawful, without qualification, for any person "to provide, attempt to provide, or offer to provide any kickback" or "to solicit, accept, or attempt to accept any kickback." 41 U.S.C. § 53. "Kickback," in turn, is defined as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract." Id. § 52(2). Since "prime contractor" means "a person who has entered into a prime contract with the United States," id. § 52(5), and "subcontractor" means any other person "who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in

connection with such prime contract," id. § 52(8), the result is to impose liability on any person who makes a payment to any other person involved in the federal procurement process for the purpose of obtaining favorable treatment.

Purdy, however, argues that an offender must have the more specific purpose of obtaining favorable treatment on a government-related contract (tantamount to a specific intent to defraud the government). To support this interpretation, he would, first, interpret the word "purpose" in § 52(2) to modify everything in the definition of "kickback" that follows thereafter, making the language about "in connection with a prime contract or . . . subcontract" part of the intent element rather than simply an objective requirement in its own right. Second, Purdy would modify the intent requirement to include language that forms no part of § 52(2) itself but can only be found in the further definition of "prime contract," to wit, "a contract or contractual action entered into by the United States." 41 U.S.C. § 52(4).

This strained interpretation -- which would create an additional, artificial burden to effective implementation of a statute Congress sought to broaden and streamline -- finds no support in either the other language of the statute or the purpose of the law. Rather, it is

directly refuted by the pertinent legislative history, which states that the "purpose" language "is intended to expand the coverage of the existing Act to kickbacks made in the Federal procurement process for any improper purpose," H.R. Rep. No. 99-964, at 11 (1986), and is not intended, as Purdy argues, to narrow the preexisting interpretations of the Act that did not make knowledge of any of the terms of the prime contract an element of liability, see Hanis v. United States, 246 F.2d 781, 784-86 (8th Cir. 1957). Indeed, the Committee Report expressly treats the portion of the definition of kickback relating to connection with a prime contract or subcontract not as part of the "purpose" provision but rather as "intended to ensure the Act's broad coverage over kickbacks that may be made by subcontractors who are in any contractual relationship related to the performance of the government's prime contract." H.R. Rep. No. 99-964, at 12 (1986).

In short, kickbacks made at any point in the government procurement process for the purpose of improperly obtaining favorable treatment are prohibited by the Act, regardless of whether or not the offender knew of the government involvement. Cf. United States v. Feola, 420 U.S. 671, 684 (1975) (defendant need not know that victim a federal officer to be guilty of assaulting a federal officer

within 18 U.S.C. § 111). It follows from this conclusion that Purdy's claim that the evidence was insufficient to establish his intent to obtain government-related business is entirely irrelevant. There is no dispute that some of the subcontracts embraced within his conspiracy were in fact connected to prime contracts with the United States, and that is sufficient to bring Purdy within the Anti-Kickback Act. Likewise, Purdy's fallback argument, that Judge Arterton failed to instruct the jury adequately as to his "defense" that he was indifferent as to whether his kickback-procured contracts were government-related or not, is likewise irrelevant, for it was not a lawful defense.[3]

Purdy also assigns as error the district court's refusal to let him call

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[3] Purdy's only other appellate objection to Judge Arterton's jury charge -- that the charge on statute of limitations failed to convey adequately his theory of defense on this aspect -- is likewise unavailing. As Purdy concedes, the charge was "technically accurate." The only portion of Purdy's requested charge on limitations that the district court declined to give was his one-sided summary of the evidence on this issue, which he argued to the jury on summation, thus fully apprising the jurors of how the defense believed the court's charge should be applied to the facts of the case.

as a witness one Carol Voss, an agent of the Defense Contract Audit Agency, who had assisted the Government in preparing its case and who would have testified, according to Purdy, that only seven of the twenty-two purchase orders that the Government contended were the fruits of the conspiracy related to prime contracts with the United States. While this fact was already before the jury through other evidence, Purdy argues that the testimony of a Government agent on this issue would have: (i) corroborated Purdy's defense that he had no specific intent to procure government-related business; (ii) impeached the credibility of a material Government witness, Bevvino, who had testified that some of the other fifteen orders might also be government-related; and (iii) impugned the "integrity" of the prosecution's case.

Although a defendant has the burden of alerting the court to his theory of relevance, see United States v. Scotti, 47 F.3d 1237, 1248 (2d Cir. 1995), the first of these three arguments was not squarely raised before the district court and the second, although raised, was promptly abandoned. Indeed, when queried by Judge Arterton as to the relevance of Voss's proffered testimony, defense counsel responded that "[t]he important thing is I think for ruling on this point is can [defendant] show a lack of integrity in the Government's case." District courts

are entitled to hold counsel to their representations of what is important. Accordingly, we think the first two relevancy arguments were not preserved for appeal.

Even if Purdy had not waived these two arguments, however, the first argument -- that Voss's testimony would have supported Purdy's defense that he had no intent to procure government-related business -- is rendered moot by our holding above that no such defense is legally cognizable. It also follows that any value the Voss testimony would have had for Purdy's second purpose -- the impeachment of Bevvino's testimony that many of the twenty-two purchase orders were government-related -- would relate to a collateral issue. Extrinsic evidence offered for impeachment on a collateral issue is properly excluded. See, e.g., Berkovich v. Hicks, 922 F.2d 1018, 1025 (2d Cir. 1991); Atlas Marine Co. v. Forsikrings-Aksjeselskapet Norske Triton, No. 92 Civ. 4746 (RPP), 1995 WL 498822, at *6 (S.D.N.Y. Aug. 22, 1995).

Purdy's third argument -- that the jury was entitled to hear Voss's testimony in order to assess whether the Government's investigation and the ensuing prosecution were conducted with "integrity" -- would, if accepted as a general rule, replace the focused, truth-seeking processes of federal jury trials

with invitations to rampant speculation and prejudicial diversion. In support of his claim that such testimony should be admitted for such a purpose, Purdy places heavy reliance on dictum in United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991). This reliance is misplaced.

In GAF, this Court found error, given the "unusual history and circumstances of [the] case," in the trial court's ruling that the defendant, who was being prosecuted for the third time, was not entitled to introduce a bill of particulars from the first of his trials that was inconsistent with the position the Government took at the third trial. Id. at 1255. The GAF Court stated:

> We think that the same considerations of fairness and maintaining the integrity of the truth-seeking function of trials that led this Court to find that opening statements of counsel and prior pleadings constitute admissions also require that a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation.

Id. at 1260. GAF is plainly distinguishable from the case at hand. Whereas the bill of particulars at issue in GAF was a binding legal admission by

the Government, here the Government made no prior admission that Voss's testimony would have confirmed or contradicted. The Government's theory of how many of the twenty-two purchase orders related to government contracts may have changed over the course of its investigation, but an earlier investigative theory is hardly the equivalent of a bill of particulars or other formal admission in an earlier trial. To bind the Government forever to a preliminary investigative theory to which it never formally committed would only discourage further investigation and thereby impede the truth-finding process.

Here, the Government, having allegedly begun with the belief that all twenty-two purchase orders were related to prime Government contracts, narrowed its approach by the time of trial to the contention that only seven of the purchase orders in question were definitely so related (although it still maintained that others were inferentially so related). Nothing in this modest narrowing of the Government's approach -- which did not contradict a single prior representation made by the Government to the district court -- opened the door to defense proof of the Government's having previously entertained a broader theory.

Moreover, even assuming arguendo that Voss's testimony were admissible for the foregoing purpose, Judge Arterton's ruling

could not be deemed reversibly erroneous, as "judges are accorded 'wide latitude' in excluding evidence that poses an undue risk of 'harassment, prejudice [or] confusion of the issues' or evidence that is 'repetitive or only marginally relevant.'" United States v. Blum, 62 F.3d 63, 67 (2d Cir. 1995) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)); see also Fed. R. Evid. 403. In the instant case, evidence of how the Government's ultimate theory had been narrowed from its initial theory would merely have distracted the jury from the central issues of the case and from its fact-finding functions. In short, under any analysis, the exclusion of Voss's testimony provides no ground for reversal on appeal.

Purdy next claims that the district court's dismissal of one of the jurors constitutes reversible error. On the fourth day of trial, defense counsel alerted the court that a person who had been present in the courtroom during the trial had approached both Purdy's wife and Purdy's co-defendant Ferris, identified himself as the husband of a juror named Stallman, and expressed views that were sympathetic to the defense. Judge Arterton then questioned juror Stallman, who stated that she did not know her husband had spoken to Ferris or Mrs. Purdy and that she had not discussed the case with him. Although Judge Arterton

indicated that she did not have reason to doubt the veracity of these responses, she discharged juror Stallman, over Purdy's objection, and replaced her with an alternate. In so doing, the district court noted that the juror's husband had been present in the court when evidence was discussed out of the jury's hearing and stated that "the risk of a mistrial in this case is so evident from the nature of the juror's husband's communications, which go to the essence of his belief on the merits or purpose of this case, and it just defies any reasonable view of human nature to think that [the husband] is not going to convey in some way or another to this juror his views, and conceivably the existence of evidence that has not been admitted in this case."

After the district court excused this juror and inquired whether any relatives of other jurors were present in the courtroom, the husband of another alternate juror, Vars, responded that he was staying to watch the proceedings. Judge Arterton told him that he had a right to be there, cautioned Mr. Vars and alternate juror Vars not to discuss the case with each other, and proceeded with the evidence. Alternate juror Vars never became a full member of the jury and thus played no part in the jury's deliberations.

Purdy argues that the district court should have handled juror Stallman the same way that it handled juror Vars - by cautioning her again not to discuss the case -- or should have taken steps short of discharge, such as the sequestration of the jury. According to Purdy, the discharge of Stallman prejudiced him significantly, both because of the "interest of an accused in retaining a chosen jury," Crist v. Bretz, 437 U.S. 28, 35 (1978) (dictum), and because the Government was probably eager to have juror Stallman removed because of the risk that she independently held views similar to those held by her husband.

District courts, however, have broad discretion under Federal Rule of Criminal Procedure 24(c) to replace a juror at any time before the jury retires if there is reasonable cause to do so, and a reviewing court will only find abuse of that discretion where there is "bias or prejudice to the defendant." United States v. Gambino, 951 F.2d 498, 503 (2d Cir. 1991) (internal quotation marks omitted); see also United States v. Agramonte, 980 F.2d 847, 850 (2d Cir. 1992) (per curiam). "Prejudice" in this context exists when the discharge is without "factual support, or for a legally irrelevant reason." United States v. Fajardo, 787 F.2d 1523, 1525 (11th Cir. 1986) (quoting United States v. Rodriguez, 573 F.2d 330, 332 (5th Cir. 1978))

(internal quotation marks omitted).

Here, the situations of juror Vars and juror Stallman were entirely different from one another. Unlike Stallman's husband, Vars's husband, although present in the courtroom, had not expressed any particular views about the case or approached the defendants or their relatives and discussed the case with them. Mr. Stallman's actions in these respects, and his obvious interest in the merits of the case, gave the district court ample reason to infer that Mr. Stallman, someone who had no sworn duty and over whom the court had no control, would press his views upon his wife, regardless of any protestations she might have made. Furthermore, even if juror Stallman never discussed the case with her husband, she would inevitably have been distracted from her duty and less able to weigh the evidence independently once she understood through the district court's questioning that her husband held a certain view of the merits of the case. These circumstances amply justified the district court's exercise of discretion in removing juror Stallman. See Agramonte, 980 F.2d at 850; Rodriguez, 573 F.2d at 332-33.

As his final point on appeal, Purdy contends that the district court erred in its interpretation and application of section 2B4.1 of the Sentencing Guidelines

and thus imposed an unlawfully high sentence. Under section 2B4.1 of the Guidelines, the base offense level for kickbacks and commercial bribery is eight, and the offense level is then adjusted upward, using the table in section 2F1.1, in accordance with the "value of the bribe or the improper benefit to be conferred" (whichever is greater). U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2B4.1(b)(1) (1996). However, if the value of the benefit cannot be determined, the value of the bribe must be used. See id. § 2B4.1 Commentary Background.

As further commentary to the Guidelines suggests, the "benefit to be conferred" is normally calculated in such situations on the basis of the profits realized (or intended to be realized) on sales obtained by bribery. Lacking appropriate data to make this calculation, however, the district court instead calculated the "benefit to be conferred" by taking initial internal price estimates prepared for each of the twenty-two sales to Sikorsky and subtracting these amounts from the ultimate prices negotiated with Sikorsky - there being testimony that the bribes enabled Purdy Co. not only to obtain the contracts but also to inflate the price estimates submitted to Sikorsky. Applying this approach to all twenty-two

purchase orders in evidence,[4] the court calculated the "improper benefit to be conferred" in this case as $1,176,155, yielding an eleven-level increase in Purdy's offense level.

The approach taken by the district court was fully supported by evidence introduced at trial and well within the court's discretion. While Purdy strenuously challenges the accuracy and reliability of the initial price estimates, these same challenges were raised at trial and the district court was in a position to assess their validity. We see no error, much less clear error, in the district court's findings. We note, moreover, that under section 2B4.1, the "improper benefit conferred" need not be determined with perfect accuracy. See United States v. Hang, 75 F.3d 1275, 1284 (8th Cir. 1996); U.S.S.G. § 2B4.1 Commentary Background (noting that the amount may be "estimated").

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[4] Neither side disputes that, for purposes of sentencing, all 22 purchase orders embraced by the conspiracy should be considered, even if not all related directly to government prime contracts. This is also fully consistent with the view we take of the broadening effect of the 1986 amendment to the Anti-Kickback Act.

In only one respect was the district court's approach logically flawed, but the error is harmless. Specifically, had the initial price estimates been submitted directly to Sikorsky without the antecedent bribes, they undoubtedly would have been negotiated downward (except in the case of two contracts that were obtained by competitive bidding), so that the difference between the putative untainted prices and the actual bribe-obtained prices would have been even greater than the district court determined. But since correction of this error could only have further disadvantaged the defendant, and the Government has not chosen to appeal the sentence, the error is harmless and the sentence is affirmed.

Accordingly, we affirm the district court's judgment in all respects.

UNITED STATES COURT OF APPEALS
For the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

United States Court ofAppeals
Second Circuit
Filed
August 12, 1998
Carolyn Clark Campbell, Clerk

Carolyn Clark Campbell
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twelfth day of August, one thousand nine hundred and ninety-eight.

USA

Appellee, Dkt No: 96-1817

v

PURDY

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant John M. Purdy, Jr.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

STATUTES AND SENTENCING GUIDELINES INVOLVED

Anti-Kickback Statutes:

41 U.S.C. § 52 provides:

As used in sections 51 to 58 of this title:

(1) The term "contracting agency", when used with respect to a prime contractor, means any department, agency, or establishment of the United States which enters into a prime contract with a prime contractor.

(2) The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(3) The term "person" means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

(4) The term "prime contract" means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

(5) The term "prime contractor" means a person who has entered into a prime contract with the United States.

(6) The term "prime contractor employee" means any officer, partner, employee, or agent of a prime contractor.

(7) The term "subcontract" means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

(8) The term "subcontractor" --

> (A) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and
>
> (B) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

(9) The term "subcontractor employee" means any officer, partner, employee, or agent of a subcontractor.

41 U.S.C. § 53 provides:

It is prohibited for any person --

(1) to provide, attempt to provide, or offer to provide any kickback;

(2) to solicit, accept, or attempt to accept any kickback; or

(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

41 U.S.C. § 54 provides:

Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with Title 18, or both.

Sentencing Guidelines - Bribery

U.S.S.G. § 2B4.1, and Commentary provides:

Bribery in Procurement of Bank Loan and Other Commercial Bribery

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the Table in § 2F1.1

* * *

Application Notes:

(1) This guideline covers commercial bribery offense and kickbacks that do not involve officials of federal, state, or local government. See Part C, Offenses Involving Public Officials, if governmental officials are involved.

(2) The "value of the improper benefit to be conferred" refers to the value of the action to be taken or effected in return for the bribe. See Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).

* * *

Background: This guideline applies to violations of various federal bribery statutes that do not involve governmental officials. The base offense level is to be enhanced based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

* * *

As with non-commercial bribery, this guideline considers not only the amount of the bribe but also the value of the action received in return. Thus, for example, if a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the $25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain. If that amount could not be estimated, the amount of the bribe would be used to determine the appropriate increase in offense level.

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized was recently increased from two to ten years. 41 U.S.C. §§ 51, 53-54. Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.

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U.S.S.G. § 2C1.1 Commentary:

Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A)If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

* * *

Commentary

Application Notes:

"Loss" is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss. The value of "the benefit received or to be received" means the net value of such benefit. Examples: (1) A government employee, in return for a $500 bribe, reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) A $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the

benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the adjustments in §2C1.1(b)(2), and §2C1.1(c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).

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Background:

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (e.g., preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot

be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.